

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

STARLLA HUDGENS, individually, and  
as Guardian Ad Litem for CH,

Plaintiffs,

vs.

NEW YORK LIFE INSURANCE  
COMPANY, BRADLEY JOHNSON, and  
DOES 1-100, Inclusive,

Defendants.

CASE NO. CV 08-08550 MMM (RCx)

ORDER GRANTING PLAINTIFF'S  
MOTION TO REMAND AND DENYING  
PLAINTIFF'S MOTION TO AMEND AS  
MOOT

On November 3, 2008, plaintiff Starlla Hudgens, on behalf of herself and as guardian ad litem for her minor child C.H., filed a complaint against defendants New York Life Insurance Company ("New York Life") and Bradley Johnson in San Luis Obispo Superior Court. New York Life removed the action to this court on December 24, 2008, asserting that the matter fell within the court's diversity jurisdiction under 28 U.S.C. §§ 1441(a) and 1332(a). On January 23, 2009, Hudgens filed a motion to remand and a motion for leave to amend her complaint. The court first considers whether Hudgens' motion to remand should be granted based on her original

1 complaint.

## 2 I. FACTUAL AND PROCEDURAL BACKGROUND

### 3 A. Factual Allegations in Hudgens' Complaint

4 Hudgens' husband, Michael Dee Hudgens (the "decedent"), purchased a life insurance  
5 policy from New York Life, naming Hudgens and the couple's child as beneficiaries.<sup>1</sup> The policy  
6 had a five-year term beginning June 1, 2005, and a \$100,000 death benefit.<sup>2</sup> Defendant Johnson,  
7 an agent of New York Life, sold the decedent the policy.<sup>3</sup> On April 27, 2007, Hudgens' husband  
8 died of "hemorrhagic shock secondary to acute hepatic failure as a result of excessive alcohol  
9 intake."<sup>4</sup>

10 Hudgens filed a claim under the policy, which New York Life denied. The insurer  
11 contended that the decedent falsely represented that he had not been counseled, treated or  
12 hospitalized for alcoholism on his policy application.<sup>5</sup> Hudgens asserts that Johnson instructed  
13 the decedent to leave portions of the application, including questions regarding his alcoholism,  
14 blank.<sup>6</sup> Johnson allegedly stated that New York Life's paramedic examiner would fill in the  
15 required information after examining the decedent.<sup>7</sup> According to Hudgens, Johnson represented  
16 that the "paramedic examiner would ask [the decedent] all medical questions necessary for [New  
17 York Life] to insure and guarantee that death benefits would be paid."<sup>8</sup> Hudgens contends that  
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20 <sup>1</sup>Complaint, ¶ 1.

21 <sup>2</sup>*Id.*, ¶ 17.

22 <sup>3</sup>*Id.*, ¶¶ 2, 12.

23 <sup>4</sup>*Id.*, ¶ 22.

24 <sup>5</sup>*Id.*, ¶ 23.

25 <sup>6</sup>*Id.*, ¶¶ 2, 12.

26 <sup>7</sup>*Id.*

27 <sup>8</sup>*Id.*, ¶ 2.

1 the examiner did not ask the decedent any questions about alcoholism.<sup>9</sup>

2       Hudgens alleges claims for breach of contract and breach of the duty of good faith and fair  
3 dealing against New York Life, and claims for intentional and negligent misrepresentation against  
4 New York Life and Johnson.

5       **B. New York Life's Notice of Removal**

6       New York Life filed a notice of removal on December 24, 2008, asserting that the matter  
7 fell within the court's diversity jurisdiction under 28 U.S.C. §§ 1441(a) and 1332(a). In its notice  
8 of removal, New York Life asserts that it is a mutual corporation organized and existing under  
9 the laws of New York, with its principal place of business in New York, and that Hudgens and  
10 C.H. are citizens of California.<sup>10</sup> New York Life contends that the court should disregard  
11 Johnson's citizenship because he is a sham defendant who has been joined only to defeat diversity  
12 jurisdiction.<sup>11</sup>

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14       **II. DISCUSSION**

15       **A. Legal Standard Governing Removal Jurisdiction**

16       The right to remove a case to federal court is entirely a creature of statute. See *Libhart*  
17 *v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979). The removal statute, 28  
18 U.S.C. § 1441, allows defendants to remove when a case originally filed in state court presents  
19 a federal question or is between citizens of different states and involves an amount in controversy  
20 that exceeds \$75,000. See 28 U.S.C. §§ 1441(a), (b); see also 28 U.S.C. §§ 1331, 1332(a).  
21 Only state court actions that could originally have been filed in federal court may be removed.  
22 28 U.S.C. § 1441(a); see *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987); *Ethridge v.*  
23 *Harbor House Rest.*, 861 F.2d 1389, 1393 (9th Cir. 1988).

24       The Ninth Circuit "strictly construe[s] the removal statute against removal jurisdiction."

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26       <sup>9</sup>*Id.*, ¶ 3.

27       <sup>10</sup>Notice of Removal, ¶ 3.

28       <sup>11</sup>*Id.*

1 *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (citing *Boggs v. Lewis*, 863 F.2d 662, 663  
 2 (9th Cir. 1988), and *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 818 (9th Cir.  
 3 1985)). "Federal jurisdiction must be rejected if there is any doubt as to the right of removal in  
 4 the first instance." *Id.* (citing *Libhart*, 592 F.2d at 1064). "The 'strong presumption' against  
 5 removal jurisdiction means that the defendant always has the burden of establishing that removal  
 6 is proper." *Id.* (citing *Nishimoto v. Federman-Bachrach & Assocs.*, 903 F.2d 709, 712 n. 3 (9th  
 7 Cir. 1990), and *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1195 (9th Cir. 1988)).

8 **B. Whether the Case Was Properly Removed under 28 U.s.c. § 1332**

9 "[J]urisdiction founded on [diversity] requires that parties be in complete diversity and the  
 10 amount in controversy exceed \$75,000." *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d  
 11 1089, 1090 (9th Cir. 2003); see 28 U.S.C. § 1332(a)(1) ("The district courts shall have original  
 12 jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of  
 13 \$75,000, exclusive of interest and costs, and is between . . . citizens of different States"). Federal  
 14 courts have jurisdiction only where there is complete diversity: the plaintiff's citizenship must be  
 15 diverse from that of each named defendant. 28 U.S.C. §§ 1332(a)(1), 1332(c)(1); see *Caterpillar,*  
 16 *Inc. v. Lewis*, 519 U.S. 61, 68 n. 3 (1996); see also *Cook v. AVI Casino Enters., Inc.*, No.  
 17 07-15088, 2008 WL 4890167, \*3 (9th Cir. Nov. 14, 2008) (Unpub. Disp.) ("We have jurisdiction  
 18 only if Cook, a resident of California, has citizenship which is diverse from that of every  
 19 defendant," citing *Lewis*, 519 U.S. at 68).

20 Here, the amount in controversy requirement is satisfied, as Hudgens seeks damages for  
 21 failure to pay the proceeds of a \$100,000 insurance policy. Because New York Life has not  
 22 alleged Johnson's citizenship, however, it has failed to establish the existence of complete  
 23 diversity. Presumably, however, it considers him a California citizen,<sup>12</sup> as it asserts that the court  
 24 should disregard Johnson's citizenship for purposes of removal jurisdiction because he was  
 25 fraudulently joined. New York Life contends there is no possibility plaintiff can prove that  
 26 Johnson is liable, and that it has named him as a defendant merely to avoid diversity jurisdiction.

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 28 <sup>12</sup>Hudgens' complaint alleges that he "works and resides" in California. (Complaint, ¶ 3.)

## 1                   **1.       Standard Governing Fraudulent Joinder**

2                   “It is a commonplace that fraudulently joined defendants will not defeat removal on  
3 diversity grounds.” *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998) (citing  
4 *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1193 & n. 1 (9th Cir. 1988); *McCabe v. General*  
5 *Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987)). A non-diverse defendant is considered  
6 fraudulent and its citizenship may be disregarded “[i]f the plaintiff fails to state a cause of action  
7 against the [non-diverse] defendant, and the failure is obvious according to the settled rules of the  
8 state.” *Hamilton Materials, Inc. v. Dow Chemical Co.*, 494 F.3d 1203, 1206 (9th Cir. 2007)  
9 (quoting *McCabe*, 811 F.2d at 1339). “Fraudulent joinder must be proven by clear and  
10 convincing evidence.” *Hamilton Materials*, 494 F.3d at 1206 (citing *Pampillonia v. RJR Nabisco,*  
11 *Inc.*, 138 F.3d 459, 461 (2d Cir. 1998)). Because courts must resolve all doubts against removal,  
12 a court determining whether joinder is fraudulent “must resolve all material ambiguities in state  
13 law in [the] plaintiff’s favor.” *Macey v. Allstate Property and Cas. Ins. Co.*, 220 F.Supp.2d  
14 1116, 1117 (N.D. Cal. 2002) (citing *Good v. Prudential*, 5 F.Supp.2d 804, 807 (N.D. Cal. 1998)).  
15 Thus, “[i]f there is a non-fanciful possibility that plaintiff can state a claim under [state] law  
16 against the non-diverse defendants[,] the court must remand.” *Id.*

## 17                   **2.       Standards Governing Insurance Agents’ Individual Liability under** 18                   **California Law**

19                   Under California law, “[a]s a general rule, insurance agents acting in the scope of their  
20 agency are not individually liable; rather, liability will rest with the insurance company.” See  
21 *Reed v. Bogdonov*, No. CIV. S-06-1386 LKK/GGH, 2006 WL 2548204, \* 2 (E.D. Cal. Sept. 1,  
22 2006) (citing *Lippert v. Bailey*, 241 Cal.App.2d 376, 382 (1966)). “There are exceptions and  
23 ambiguities to th[is] [general] rule[, however]. These exceptions are not well settled under  
24 California law.” *Id.* In *Macey*, 220 F.Supp.2d 1116, the Northern District of California  
25 identified two general categories of exceptions. It explained that “there are two separate (if not  
26 always completely unrelated) ‘lines of exception’ to the general [ ]rule – one sounding in notions  
27 of dual agency, and another, . . . sounding in notions of ‘special duty.’” *Id.* at 1120. Under the  
28 “special duty” exception,

1 “the general rule changes, and a duty in an agent. . . may arise, when any one of the following  
 2 circumstances can be proved: (a) the agent misrepresents the nature, extent or scope of the  
 3 coverage being offered or provided. . . , (b) there is a request or inquiry by the insured for a  
 4 particular type or extent of coverage. . . , or (c) the agent assumes an additional duty by either  
 5 express agreement or by ‘holding himself out’ as having expertise in a given field of insurance  
 6 being sought by the insured. . . .” *Macey*, 220 F.Supp at 1125-26 (quoting *Fitzpatrick v. Hayes*,  
 7 57 Cal.App.4th 916, 927 (1997) (first set of internal quotation marks omitted); see also *Limm v.*  
 8 *Hahn*, No. Civ. S-06-1242 WBS DAD, 2006 WL 2401810, \*2 (E.D.Cal. Aug. 18, 2006) (listing  
 9 same circumstances).

10 Further, insurance agents may be held personally liable for intentional misrepresentation  
 11 or fraud. See *McNeill v. State Farm Life Ins. Co.*, 116 Cal.App.4th 597, 603 (2004)  
 12 (“Defendants finally contend that the action was properly dismissed with respect to [the agent],  
 13 because only an insurer, not its agent, may liable to the insured on account of the agent’s acts  
 14 within the disclosed scope of employment. The authorities defendants cite reflect that this rule  
 15 applies to cases involving failure to procure insurance coverage as requested or agreed upon. . . .  
 16 But the present cause of action charges intentional misrepresentation, or fraud. Like other agents,  
 17 an insurance company’s may be personally responsible when they commit that tort” (citations  
 18 omitted)); see generally *Provident Land Corp. v. Bartlett*, 72 Cal.App.2d 672, 687 (1946) (“A  
 19 corporate officer or agent is personally liable for damages caused by his fraud or deceit, to the  
 20 person directly injured thereby”).

21 **3. Whether There Is a “Non-Fanciful” Possibility That Johnson Is**  
 22 **Individually Liable Based on the Allegations in Hudgens’ Complaint**

23 Hudgens alleges that Johnson “represented that the medical underwriting questions in the  
 24 application need not be completed as the paramedic[ ] examiner would ask all questions necessary  
 25 in order for the policy to be issued and delivered.”<sup>13</sup> The complaint also alleges that the decedent  
 26 “reasonably relied on [Johnson’s] representations in view of the superior knowledge of [Johnson]

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 28 <sup>13</sup>Complaint, ¶ 12.

1 and the fiduciary and/or special relationship between the parties.”<sup>14</sup> Essentially, the gravamen of  
 2 Hudgens’ allegations is that, based on Johnson’s representations, the decedent believed that any  
 3 information not requested by the paramedic examiner was not material to his ability to obtain  
 4 coverage.

5 These allegations may suffice to establish Johnson’s individual liability under the special  
 6 duty exception because Johnson’s statements could be deemed to be misrepresentations regarding  
 7 the “nature, extent or scope of the coverage being offered or provided.” Certainly, the court  
 8 cannot conclude to a “near certainty” that Hudgens’ allegations fail to state a claim against  
 9 Johnson. See *Limm*, 2006 WL 2401810 (“Because the court cannot find to a near certainty that  
 10 there is no cause of action against defendant Hahn for breach of a special duty in state court, Hahn  
 11 is a proper defendant for the purposes of this motion,” citing *Bennet v. Allstate Ins. Co.*, 753  
 12 F.Supp. 299, 302 (N.D. Cal.1990).

13 Although the court has not found a case directly on point, prior cases have found there was  
 14 potential liability where an agent misrepresents the type of medical information that was relevant  
 15 to assessing whether an insured was entitled to coverage. In *Quiroz v. Valley Forge Ins. Co.*, No.  
 16 C 05-2025 SBA, 2005 WL 1806366, \*2 (N.D. Cal. July 28, 2005), the court considered whether  
 17 an insurance agent was fraudulently joined as a defendant. As in the present case, the plaintiff’s  
 18 complaint alleged that the agent defendant was an agent of the insurance company defendant. *Id.*  
 19 at \*1. The agent asked the plaintiff questions about his medical history and helped him fill out  
 20 an application for mortgage insurance with one of the insurance company’s subsidiaries. *Id.* The  
 21 application was denied, and the agent then filled out an application for the plaintiff with a different  
 22 subsidiary. The second application omitted certain medical information. *Id.* Plaintiff’s complaint  
 23 alleged that “[the agent] led [the plaintiff] to believe that any facts not on the [insurance]  
 24 application, but disclosed to [the agent], were not required, and/or material to the issuance of the  
 25 subject insurance Policy.” *Id.* at \*7. After the plaintiff was injured and became disabled, the  
 26 insurance company asserted that he had made material misrepresentations on the application. *Id.*

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 28 <sup>14</sup>*Id.*, ¶ 45.

1 at \*2. The plaintiff filed a complaint in state court, and the insurance company removed, alleging  
2 that the agent was fraudulently joined. *Id.*

3 Plaintiff argued that he could maintain a cause of action against the agent on various  
4 theories, including that “[the agent] assumed a special duty toward [the plaintiff] when he failed  
5 to disclose certain essential medical information on the [insurance] application and misrepresented  
6 to [the plaintiff] that the medical information was not material to [the insurance company].” *Id.*  
7 at \*5. Addressing this argument, the court noted that “[i]t is well established under California law  
8 that ‘[a]n insurance agent has an obligation to use reasonable care, diligence, and judgment in  
9 procuring the insurance requested by an insured.’” *Id.* at \*6 (quoting *Butcher v. Truck Ins.*  
10 *Exchange*, 77 Cal.App. 4th 1442, 1461 (2000)). The court concluded that “it cannot be said with  
11 certainty that California courts would refuse to recognize a cause of action against [the agent].”  
12 *Id.* at \*7. In so concluding, the court relied in part on the allegation that the agent misrepresented  
13 the materiality of certain aspects of plaintiff’s medical history to his ability to obtain coverage.  
14 See *id.*

15 Unlike the plaintiff in *Quiroz*, the decedent here did not disclose information to Johnson  
16 regarding his medical history. Rather, he disclosed the information to the paramedic examiner  
17 in response to the examiner’s questions. Nevertheless, *Quiroz* suggests that Johnson’s  
18 representation that no information other than that requested by the paramedic examiner was  
19 material may be sufficient to trigger individual liability under the special duty exception. Like  
20 the plaintiff in *Quiroz*, the decedent relied on the agent’s superior knowledge in determining which  
21 aspects of his medical history had to be disclosed to obtain coverage. Drawing all inferences in  
22 Hudgens’ favor, the complaint alleges that Johnson represented that the only medical information  
23 material to the decedent’s coverage was the information requested by the paramedic examiner.  
24 Because Johnson could not be sure what questions the examiner would ask, this may have caused  
25 the decedent to fail to disclose information relevant to underwriting. As did *Quiroz*, who relied  
26 on the agent to determine what medical information to include in the application, the decedent  
27 relied on Johnson’s representations in concluding that it was acceptable to leave the answers to  
28 certain medical questions blank. Accordingly, resolving all ambiguities in California law in



1 Hudgens' favor, Johnson may be individually liable under California law. See *id.* at \*7;

2 More fundamentally, Hudgens' complaint alleges a cause of action against Johnson for  
3 intentional, as well as negligent, misrepresentation. Under California law, insurance agents are  
4 individually liable to those injured by their intentional misrepresentations separate and apart from  
5 the special duty exception. See *McNeill*, 116 Cal. App. 4th at 603.<sup>15</sup> Thus, even if Hudgens  
6 cannot state a claim against Johnson for negligent misrepresentation under the special duty  
7 exception, she can maintain an action against him for intentional misrepresentation.

8 In sum, the court finds there is a non-fanciful possibility that Hudgens' allegations state  
9 a claim against Johnson under California law, and Johnson is therefore not fraudulently joined.  
10 Because Johnson's presence defeats complete diversity, the court cannot exercise jurisdiction over  
11 this action. Accordingly, plaintiff's motion is granted.


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15 <sup>15</sup>In *Cecena v. Allstate Ins. Co.*, No. C 05-03178-JF, 2005 WL 2893780, \*3 (N.D. Cal.  
16 Nov. 2, 2005), the court attempted to distinguish *McNeill* in finding that an insurance agent had  
17 been fraudulently joined. Citing the general principle that "an insurance agent has no liability for  
18 acts undertaken within the scope of his or her agency," the court concluded that "[p]laintiffs'  
19 attempt to amend its [c]omplaint in order to state new causes of action against [the agent] for fraud  
20 and negligent misrepresentation [were] futile." *Id.* In a footnote, the court stated that *McNeill*  
21 was inapplicable to plaintiff's claims because the *McNeill* court had relied on the "complaint's  
22 indication of a long-term relationship between [the agent] and plaintiff." *Id.* at \*3 n. 5. It is  
23 clear, however, that the *McNeill* court referenced the longstanding nature of the relationship  
24 between plaintiff and the agent in assessing whether the agent could be held liable because she was  
25 a dual agent (i.e., an agent of both the insurer and the insured). This is a separate exception to  
26 the general rule of non-liability.

27 In holding that insurance agents could be held individually liable for intentional  
28 misrepresentation, the *McNeill* court relied on general principles of agency and tort law, not the  
specific factual circumstances before it. See *McNeill*, 116 Cal.App.4th at 603 ("Like other agents,  
an insurance company's may be personally responsible when they commit [intentional  
misrepresentation]"). *McNeill* has not been overruled and remains good law. Moreover, even if  
the court in *Cecena* correctly distinguished *McNeill* – and the court does not believe that it did –  
*McNeill* and *Cecena* at the very least demonstrate that California law is ambiguous as to whether  
an agent may be individually liable for intentional representation without application of the special  
duty exception. This is all that is necessary for the court to conclude that Johnson was not  
fraudulently joined.

1 **III. CONCLUSION**

2 For the reasons stated, plaintiff's motion to remand is granted. Because the court  
3 concludes that it lack jurisdiction over the case as alleged in Hudgens' original complaint,  
4 plaintiff's motion to amend is denied as moot. The clerk is directed to remand this action to San  
5 Luis Obispo Superior Court forthwith.

6  
7 DATED: March 17, 2009

  
MARGARET M. MORROW  
UNITED STATES DISTRICT JUDGE